JD(SF)–12–04
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

ARIZONA MECHANICAL INSULATION, LLC

and Case 28-CA-18622

INTERNATIONAL ASSOCIATION OF HEAT
AND FROST INSULATORS AND ASBESTOS
WORKERS, LOCAL 73, AFL-CIO

John Giannopoulos, Esq., for the General Counsel.

Don A. Peterson, for the Charging Party.

Doug Tobler, Esq. of Hammond & Tobler, P.C.
of Phoenix, AZ for the Respondent.

DECISION

I. Statement of the Case

Thomas M. Patton, Administrative Law Judge. A hearing was held in these cases at Phoenix, Arizona, on September 24 – 25, 2003. The charge was filed by International Association of Heat and Frost Insulators and Asbestos Workers, Local 73, AFL-CIO (Local 73 or the Union) on March 31, 2003 and was served on April 1, 2003. The charge is against Arizona Mechanical Insulation, LLC (AMI or Respondent). The complaint issued against AMI on June 27, 2003.

II. Findings of Fact

A. Jurisdiction

AMI is an Arizona limited liability company that has its principal office and place of business in Hereford, Arizona. AMI admits and I find that it meets the Board's standards for asserting jurisdiction based on its operations and that it in employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The Respondent admits and I find that Local 73 is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background and Introduction

AMI is an insulation contractor that performs insulation work in the building and construction industry. Monica Schwarz and her husband, Tony Schwarz, own the business. The company was formed in June 1999 and is operated out of the Schwarz' home in Hereford, Arizona. Hereford is a small town in a rural area near the Mexico border, about a four-hour drive from Phoenix, where the Union's offices are located. Ms. Schwarz is employed full time as a schoolteacher. She performs office and administrative duties for the Respondent, but does not possess insulation trade skills and does not perform insulation work. As will be discussed in some detail later, Ms. Schwarz represented AMI in dealing with the Union. There is no evidence that she had prior training or experience in managing a business. Mr. Schwarz is skilled in insulation work, manages the jobs and works with the tools. Mr. Schwarz had worked at the trade for about 20 years before AMI was formed, and was a union member for ten years. There is no evidence that Mr. Schwarz had management experience prior to the formation of AMI. AMI does not have any regular employees, but at times has hired one or more insulation trade employees as needed to staff construction jobs.

Local 73 is a state-wide local that enters into Section 8(f) collective-bargaining agreements with employers in the construction industry covering employees performing work within the Union's jurisdiction throughout the state of Arizona. Each contract in evidence has identical terms for all signatory employers at any given time and is called the Master Agreement. Each Master Agreement is in the style typically found in area agreements offered to individual employers in the construction industry, with a blank space where the name of an individual employer is inserted. Each contracting employer individually signs a separate copy of the Master Agreement. The Master Agreements are not based upon a written agreement executed by the Union and representatives acting on behalf of an employer bargaining group and no employer bargaining group is a signatory party to the Master Agreements. The Master Agreements are for a fixed term and do not provide for automatic extension and do not require a notice to terminate.

The expiration date of the Master Agreement in effect at the time AMI was formed was August 1, 1999. AMI expressed a wish to sign a prehire agreement with Local 73 and was offered an interim agreement by the Local 73 Business Manager, Don Peterson. Ms. Schwarz signed an interim agreement for AMI on September 27, 1999. The interim agreement required AMI to comply with the terms of the then-expired Master Agreement and to sign a new Master Agreement (1999 Agreement) that was being negotiated by the Local 73 and other employers. The negotiations were in their final phase and AMI was not invited to participate in the negotiation of the1999 Agreement. The term of the interim agreement was 30 days, unless terminated sooner by AMI entering into a longer-term agreement.

The terms of the 1999 Agreement were thereafter established and AMI individually signed a copy of the 1999 Agreement on November 2, 1999, and began its first job on December 1, 1999. AMI complied with the terms of the 1999 Agreement, which expired on September 1, 2002.

In September 2002[1] a new 8(f) Master Agreement (2002 Agreement) was negotiated and ratified by the Local 73 membership. AMI participated in some of the negotiations, but

[1] Unless otherwise stated, all dates hereafter are 2002.

declined to sign the 2002 Agreement. The complaint alleges that the Respondent thereby violated Section 8(a)(1) and (5) of the Act. The Respondent contends that it is not bound by the 2002 Agreement.

Both the 1999 Agreement and the 2002 Agreement require all employees to be dispatched from the Union hiring hall and contain provisions typically found in collective-bargaining agreements in the building and construction industry, including wage rates, a health benefits plan and other benefits. The initial three paragraphs of each agreement are as follows:

> Agreement between the _____ and International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 73, PHOENIX AND TUCSON, ARIZONA.
>
> Article I
> Terms of Agreement
>
> This agreement effective [date] between the_____, party of the first part hereinafter referred to as the Employer or Employers and the International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 73 shall terminate [date].
>
> Article II
>
> Recognition – Territorial Jurisdiction
>
> A. Recognition
>
> The Employers recognize the Union as the exclusive Collective Bargaining agent for Mechanics and Apprentices who perform any of the duties as described in Article III, Section A. hereof.
>
> The Union recognizes the_____ as the bargaining Employer.

The name of the individual signatory employer is inserted in the blanks and an agent of the Union and the individual signatory employer sign the agreement.

B. 2002 Negotiations and Subsequent Events

On June 17 Peterson sent a letter to AMI and the other contractors signatory to the 1999 Agreement, stating that the Union wished to meet to begin negotiations for a new Master Agreement. The June 17 letter to AMI was addressed to "All Signatory Contractors" and did not name any employer association or any employer other than AMI. There followed 12 meetings regarding the terms of a new Master Agreement. Meetings were at the Union's offices and at the Federal Mediation and Conciliation Service (FMCS). Negotiations at three sessions were conducted with an FMCS mediator and were not face-to-face negotiations.

Don Peterson was the principal union spokesperson. The primary employer spokesperson was Bryan Rymer, regional manager for Performance Contracting Group (PCG), a national specialty contracting company. Ryan manages PCG operations in Arizona and several other states. Ryan testified that he was a board member and a past president of the Western Insulation Contractors Association, also known as WICA, an association of union signatory employers that has negotiated labor agreements with Local 73 for about 35 years. AMI did not participate in Rymer's designation as spokesperson.

WICA does not obtain letters of assent from employers to represent them in collective bargaining. Rymer testified that all WICA members who had places of business in Arizona participated in the negotiations for the 2002 Agreement. WICA has other members that do not maintain places of business in Arizona. The record does not disclose whether membership in WICA includes authorizing WICA to bargain for the member. Implicitly, the evidence indicates that WICA members routinely sign individually the applicable union agreement in the area where they are working. The 1999 Agreement required payments to a pension fund governed by WICA and Western States Conference of Asbestos Workers and incorporates other agreements relating to fringe benefits to which WICA is a party. The 1999 Agreement does not, however, identify WICA as being a party to the collective-bargaining agreement.

Monica Schwarz and representatives of five other employers attended the initial July 29 meeting. The initial meeting was at the union hall. Four of the six employers who participated in the July 29 meeting were WICA members. The attendance sheet that was signed by Schwarz at that meeting had "WICA" written at the top. Schwarz credibly testified that when she signed the attendance sheet she did not associate WICA with Western Insulation Contractors Association and that she was unfamiliar with the organization prior to the 2002 negotiations. The 30-day interim agreement signed by Monica Schwarz in 1999 provided, in part:

> WHEREAS, the 1996-1999 agreement between Signatory Insulation Contractors (Employers) and the Union expired on July 31, 1999, and
>
> WHEREAS, the Employer hereto desires . . . to adopt the industry agreements now being negotiated between the Union and the Western Insulation Contractors Association, Arizona Chapter, and/or certain contractors party to said agreement, as soon as said agreement, which will be designated as the "industry agreement" is executed by the parties . . . .

There is no evidence that AMI possessed any other information regarding the identity of Western Insulation Contractors Association/WICA prior to the 2002 negotiations. The General Counsel contends that Tony Schwarz should be presumed to have been familiar with WICA prior to the negotiations, based upon his work experience and union membership. I find that such a presumption is not warranted and I decline to infer such knowledge based on the record evidence. I also conclude, contrary to the contention of the General Counsel, that the evidence does not establish that Respondent was familiar with WICA as a consequence of adopting and working under the 1999 Agreement.

There is an absence of evidence that AMI was ever a member of WICA. Rymer testified that AMI was not a WICA member. At one negotiation meeting, with only employer representatives present, Rymer suggested to Schwarz that AMI join WICA, but she declined.

The cover of the printed booklet version of the 2002 Agreement states that the agreement was between Local 73 and WICA and "Independent Contractors". That language is not reflected in the text of the document. WICA is not named as a contracting party to the 2002 Agreement. The booklet version was printed well after AMI refused to sign the 2002 Agreement and little weight is given to the booklet cover. There is no evidence that any relevant collective-bargaining agreement was signed by WICA in a representative capacity.

Some, but not all, of the employers signatory to the 1999 Agreement were represented in the 2002 negotiations. There were representatives of seven identified employers at some or all of the sessions. An otherwise unidentified representative named Scott Swan was at one session. Monica Schwarz represented AMI at four face-to-face negotiation meetings.

The following identified employers were represented during negotiations. The WICA membership and the names of the representative (excluding Scott Swan) are as indicated:

Performance Contracting Group	(WICA member)	Bryan Rymer
Thorpe Insulation	(WICA member)	Mark Hammer
F. Rogers Insulation	(WICA member)	Brett Petillo
Argus Contracting	(WICA member)	Don Rugierro
Service Insulation Systems	(WICA non-member)	Ron Basinger
AMI	(WICA non-member)	Monica Schwarz
Performance Insulation	(WICA non-member)	Gregg Schrantz

The dates of negotiation meetings and the employer representatives present at the face-to-face meetings were as follows:

July 29	Rymer, Hammer, Petillo, Rugierro, Basinger, Schwarz
August 6	Rymer, Hammer, Petillo, Rugierro, Basinger, Schwarz
August 14	Rymer, Hammer, Petillo, Rugierro, Basinger, Schwarz
August 15	FMCS session, not face-to-face
August 28	Rymer, Hammer, Petillo, Basinger, Schrantz
August 29	FMCS session, not face-to-face
August 30	FMCS session, not face-to-face
September 4	Rymer, Hammer, Petillo, Rugierro, Basinger
September 5	Rymer, Hammer, Rugierro, Basinger, Schrantz
September 6	Hammer, Rugierro, Basinger, Schwarz
September 16	Rymer, Hammer, Petillo, Rugierro, Basinger
September 19	Rymer, Hammer, Petillo, Rugierro, Basinger

The only employer representative Schwarz had met prior to the initial July 29 meeting was Ron Basinger, representing Service Insulation Systems, a company that had formerly employed her husband. At the July 29 meeting the Union presented a copy of the 1999 Agreement that was annotated with proposed changes. Following a caucus the parties met and the proposal was discussed. There is no evidence that anyone other than Rymer and Peterson took an active role in the July 29 negotiations.

The subsequent negotiation meetings involved the typical give and take of collective bargaining. Copies of some employer written offers made when Schwarz was present have handwritten notations that they were WICA offers. The negotiation notes of the participants reflect limited participation by Schwarz. At the August 6 meeting she proposed that the travel mileage rate for employees be based on the IRS allowed amount. That proposal was adopted. The mileage rate was significant for AMI because employees dispatched from the hiring hall typically have a long drive to the area where AMI worked.

During the negotiations Rymer sent e-mails to the employers that participated in the negotiations, other than Performance Insulation. Rymer advised the employers of meetings and other matters of interest during negotiations. Schwarz exchanged e-mails with Rymer regarding questions she had about health insurance and a brief strike that occurred during negotiations. The last meeting attended by Schwarz was on September 6.

On September 19 there was movement on several issues and agreement was reached; subject to ratification by the Local 73 members. The Union membership ratified the 2002 Agreement on September 21. Peterson advised Rymer of the ratification. On September 24

Peterson faxed the rates for wages and travel contained in the 2002 Agreement to the employers who had been signatory to the 1999 Agreement and asked that the wages and mileage be adjusted accordingly. On October 4 Rymer sent a copy of the new Master Agreement by e-mail to Monica Schwarz and representatives of the other employers that had attended negotiation meetings, other than Gregg Schrantz and Scott Swan.

On October 18, Schwarz wrote a letter to Peterson that included the following:

> I hereby notify Local 73, after dutiful consideration the terms of the contract ratified on September 22, 2002 are not functional for the market in Southeastern Arizona. Attempts have been made to meet with you personally and in order to discuss the ramifications of the contract to no avail. Thus, Arizona Mechanical Insulation cannot remain signatory to Local 73 given the present guidelines established on September 22, 2002.

AMI remitted payments for union dues and fringe benefits to the Union for the months of September, October and November and paid wages consistent with the 2002 Agreement for those months. During the months of September and October AMI employed a single employee, Eduardo Martinez, and no employees in November. Martinez was president of Local 73. Reports filed by AMI reflect that Martinez worked 48 hours in September and 40 hours in October. The reports reflect Tony Schwarz worked 99 hours in September, 101 hours in October and 18 hours in November. The dates they worked are not shown in the record.

Peterson traveled to the jobsite where Tony Schwarz was working on November 4 and spoke with him in the company of Eduardo Martinez. Peterson testified that Tony Schwarz was a member of Local 73 who was working for a non-signatory contractor and he was trying to see if a way could be found to make AMI a party to the 2002 Agreement. Tony Schwarz told Peterson he had to talk to Monica Schwarz. Peterson later communicated with Monica Schwarz and a meeting was arranged for November 9.

Peterson, Martinez, Monica Schwarz and Tony Schwarz met at a restaurant in Tucson on November 9. At that meeting Monica Schwarz expressed concerns about the provisions in the 2002 Agreement regarding health benefits, particularly the availability of service in the Hereford area; the number of hours that had to be worked for an employee to qualify for health benefits; the per diem costs of employees who traveled to the Hereford area to work; and the lack of an apprentice program in Tucson, which would give AMI access to apprentices closer to the Hereford area. There was no resolution of these issues. Following the November 9 meeting, Peterson sought the assistance of the FMCS and sent a copy of the 2002 Agreement to AMI. AMI has declined to sign. In November Tony Schwarz resigned his Union membership, AMI ceased making remittances to the Union and there have been no further meetings with the Union.

It is not essential to resolve the four following fact issues to determine whether there was a violation of the Act. I do not rely on the evidence regarding these matters in reaching a decision. I shall nevertheless address them, should the Board choose to consider them on review.

First, Schwarz described an individual meeting she had with Peterson following the July 29 meeting. According to Schwarz, she remained behind after the meeting concluded and engaged Peterson in a separate discussion of matters of particular concern to AMI. The subjects of the discussions were payments AMI was owed by the Union relating to a job known as the Douglas Border Patrol Station. Peterson testified before Schwarz and was asked on cross-examination about the conversation. He stated that he did not recall the conversation, but

then acknowledged discussing the subjects of the conversation with Schwarz. Peterson was recalled following Schwarz's testimony, but did not testify further about the incident. According to Schwarz, Rymer came into the room and interrupted her conversation with Peterson and said that the other contractors were waiting outside and asked her to join them. According to Schwarz, she excused herself and joined the other contractors outside, at which time Rymer asked Schwarz what she was doing and stating, "Things have to go through me". Schwarz testified that she told Rymer that she had matters to discuss with Peterson and that she could take care of herself. Rymer testified before Schwarz and when asked about this incident on cross-examination he testified only that he did not recall the conversation. None of the other employer representatives present during the parking lot conversation testified.

I found Schwarz's testimony regarding the events following the July 29 meeting to have been credibly offered and not improbable. Peterson's testimony regarding this incident was equivocal and not convincingly offered. Moreover, he impressed me as having a less sure recollection of events. Rymer's testimony of that he had no recall is insufficient to overcome the credibly offered testimony of Schwarz and her testimony regarding the July 29 incident is credited.

Second, Schwarz testified regarding asserted statements made to her by Rymer and Peterson at a meeting in a conference room at the FMCS concerning Schwarz authorizing WICA to bargain for AMI. She testified that this occurred at the last negotiation meeting she attended. The Union's notes show that the last meeting she attended, on September 6, was at the FMCS and both Peterson and Rymer were present. Schwarz testified that Peterson suggested that Schwarz sign a document that he said would relieve her from traveling to the meetings in Phoenix and that WICA would represent AMI. She testified that she stated that she was unwilling to sign the document because her needs would not be represented. Peterson testified that at no time did he ask Monica Schwarz to sign a document to let WICA bargain for Respondent. He did not deny that AMI was offered an interim agreement. In his testimony prior to Schwarz, Rymer testified that during bargaining it had been proposed that there be an interim agreement that would permit smaller contractors to work during a strike. Before the September 6 meeting a strike had been authorized. I infer that the proposed interim agreement would be similar to the 1999 interim agreement AMI signed. Based upon the probabilities and considering the demeanor of the witnesses and all the testimony on this issue, I credit Schwarz's testimony on this fact issue and find that on September 6, Peterson proposed that Schwarz sign an interim agreement that would have bound AMI to the 2002 Agreement.

Third, Monica Schwarz made a telephone call to the Local 73 office on September 13 at 1:11 p.m. Schwarz testified that the phone was answered by Peterson's secretary, Linda Lloyd. According to Schwarz, she asked to speak to Peterson, Lloyd told her that Peterson was out of the state for two weeks, Schwarz asked that he call her when he returned and terminated the conversation. Lloyd had a telephone message book that did not reflect Schwarz's call and she denied the conversation. Telephone records show that a call to the Local 73 office was placed from Schwarz's phone on the date and at the time described by Schwarz that lasted one minute or less. Considering the probabilities, the documentary evidence and the demeanor of the witnesses, I credit Schwarz.

Fourth, Peterson maintained that he was contractually bound to treat all signatory contractors the same and that he could not negotiate different terms for AMI because of the "Favorite Nation" provision that was routinely a part of the Master Agreement, including the 1999 Agreement and the 2002 Agreement. The provision reads as follows:

> In no event shall the Employer be required to pay lower rates of wages or be subject to more unfavorable work rules established under the contract that any other person, firm, or corporation to whom Local No. 73 furnishes labor pertaining to work in the insulation industry.

The negotiation notes disclose that during negotiations Rymer proposed deleting the Favorite Nation provision and the Union insisted that it be retained. There is no evidence that the wording of the provision, its meaning or its effect was discussed. The record does not show that Schwarz was present at the meetings where the Favorite Nation clause was discussed. It is not clear why Peterson believed that he could not negotiate different terms with AMI based on this provision. Whatever the undisclosed actual intent of the parties that negotiated the Favorite Nation provision, knowledge of that intent cannot be imputed to AMI to support a contention that AMI participated in the 2002 negotiations with an intent to be bound by group action.

C. Analysis

1. AMI's actions prior to negotiations for the 2002 Agreement

The complaint alleges in paragraph 5(b):

> In or about September 1999, the Respondent entered into an Interim Agreement with the Union whereby it agreed to be bound to the then-existing collective-bargaining agreement and agreed to be bound to future industry agreements, which were negotiated between the Union and Association.

The answer denies that AMI agreed to be bound to future agreements. In the interim agreement AMI agreed only to " . . . adopt the industry agreements now being negotiated between the Union and the Western Insulation Contractors Association, Arizona Chapter, and/or certain contractors parties to said agreement . . . ." It is patently clear that the terms of the interim agreement did not include an agreement by AMI to be a party to any agreement beyond the 1999 Agreement, together with its auxiliary agreements and addendums.

The 1999 Agreement signed by AMI, as required by the interim agreement, was a "me too" agreement. Such agreements are strictly confined to their precise terms. *GEM Management Co., Inc*., 339 NLRB No. 71 (2003). The terms of the 1999 Agreement did not bind AMI to future agreements. See *Ruan Transport Corp.*, 234 N.L.R.B. 241 (1978).

In paragraph 2(d) the complaint alleges that AMI was a member of WICA. The answer denies this allegation. There is no evidence to support complaint paragraph 2(d) and the testimony of Schwarz and Rymer affirmatively show that AMI was never a WICA member.

There is no substantial and probative evidence that prior to the opening of negotiations for the 2002 Agreement AMI was represented in collective bargaining by group rather than individual action. There is also no evidence that prior to the beginning of the 2002 negotiations the Union, WICA or any participating employer informed AMI that they would view AMI's participation in negotiations as binding AMI to group negotiations. Accordingly, AMI had no duty to inform the Union, WICA or other signatory employers prior to the opening of negotiations for the 2002 Agreement of AMI's intent to pursue an individual course of action with respect to labor relations. *John Deklewa & Sons,* 282 NLRB 1375 (1987); *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978). Cf. *Reliable Electric Co*., 286 NLRB 834 (1987).

2. AMI's participation in the 2002 negotiations

AMI had no legal duty to enter into negotiations with the Union regarding the 2002 Agreement because at all times AMI's relationship with the Union was governed by Section 8(f) of the Act. Under Section 8(f) an individual employer in the construction industry may choose to enter into a prehire agreement with a minority union. Upon the expiration of the agreement the union enjoys no presumption of majority status and either party may repudiate the 8(f) relationship. *John Deklewa & Sons*, 282 NLRB 1375 (1987).

A starting point for resolving the legal effect of AMI's participation in the 2002 negotiations is the concurring opinion of Justice Stevens in *Charles D. Bonanno Linen Service, Inc.,* 454 US 404, 419-420 (1982). On brief both the General Counsel and the Respondent begin their argument by citing Justice Stevens' opinion. The Board has likewise cited that opinion as setting forth the standards to determine whether an employer or a union has made a binding commitment to group negotiations. See *Detroit Newspaper Agency*, 326 NLRB 700 (1998); *Painters Dist. Council 51 (Management Corp.),* 299 NLRB 618 (1990). In *Bonanno Linen* Justice Stevens wrote:

> The mere fact that an employer bargains in conjunction with other employers does not necessarily mean that it must sign any contract that is negotiated by the group. The Board requires that, to be bound by the terms of group negotiation, the members of an employer association must "have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action," and the union representing their employees must "[have] been notified of the formation of the group and the delegation of bargaining authority to it, and [have] assented and entered upon negotiations with the group's representative." *Weyerhaeuser Co.*, 166 N.L.R.B. 299, 299 (1967), enf'd, 130 U.S.App.D.C. 176, 398 F.2d 770 (1968). This test is well established in the Courts of Appeals. See, e.g., *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (CA5 1977); *Komatz Construction, Inc. v. NLRB*, 458 F.2d 317, 321 (CA8 1972); *NLRB v. Hart*, 453 F.2d 215, 217 (CA9 1971), cert. denied, 409 U.S. 844, 93 S.Ct. 46, 34 L.Ed.2d 84 (1972); *NLRB v. Dover Tavern Owners' Assn.*, 412 F.2d 725, 727 (CA3 1969). Absent such an unequivocal commitment to be bound by group action, an employer is free to withdraw from group negotiation at any time, or simply to reject the terms of the final group contract. See *Komatz Construction*, supra; *Ruan Transport Corp.*, 234 NLRB 241 (1978).

There is no evidence that AMI expressly communicated to the Union or to the other participants in the 2002 negotiations an intent at the outset of the 2002 bargaining, or at any time thereafter, to be bound in collective bargaining by group rather than individual action.

In some circumstances the Board has found that an employer was bound by group action even in the absence of express agreement. See *Francis Chevrolet Company*, 211 NLRB 740 (1974). The General Counsel contends that the circumstances of AMI's participation in the 2002 negotiations warrant an inference that AMI agreed to be bound by group negotiations. I do not agree.

On brief the General Counsel, quoting from *James Luterbach Construction Co.*, 315 NLRB 976, 980 (1994), contends, "[A]n 8(f) employer that engages in a distinct affirmative act that would reasonably lead the union to believe that the employer intended to be bound by the upcoming or current negotiations will be deemed to have agreed to be bound by the results of that bargaining." This standard is not applicable, however, to an employer like AMI that has had no history of group bargaining. Rather, it was the second step in a two-step analysis to

determine whether an employer that had been bound in collective bargaining by group action in an expiring contract is bound by group bargaining for a successor contract.

The first step of the *Luterbach* analysis was whether the employer was bound to the expiring contract by group collective bargaining rather than individual action. For the reasons previously discussed, AMI was not bound to the 1999 Agreement as a member of a multi-employer bargaining group. Accordingly, AMI was not bound to group bargaining using the *Luterbach* analysis.

The General Counsel also points to wording in the decision in *Custom Colors Contractors*, 226 NLRB 851, 853 (1976), where the Board states:

> The manifestation of an "unequivocal intention" to be bound requires something less, however, than a solemnly executed document signed and sealed with hot wax. A commitment to bargaining on a multiemployer basis will not be made to depend on the presence of a formal associational structure among the bargaining participants or on the formal delegation of authority from the individual employer to the multiemployer group. Nor will the Board, faced with outward manifestations of intent to engage in group bargaining, consider as controlling an employer's private manifestations of dissent. An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority. (Footnotes omitted).

Assuming, without finding, that all the other employers that participated in the 2002 negotiations had an intent to bargain on a group basis, the objective evidence does not establish that AMI had knowledge of those other employers' intent or that AMI unequivocal communicated an intention to be bound by group action.

The General Counsel contends that it should have been clear to everyone present that the various contractors were bargaining on a multiemployer basis. This contention is not persuasive. The mere fact that several employers meet together with a union to negotiate does not establish, prima facie, that they are bargaining as a group for a single set of contract terms. Rather, the *Bonanno Linen* standards reject such a presumption by stating that an employer that has not communicated its unequivocal intention to be bound in collective bargaining by group rather than individual action is privileged to attend group negotiations and thereafter simply refuse to sign the agreement reached. The General Counsel emphasizes that Schwarz never told the other participants that AMI was bargaining individually. AMI had no affirmative obligation to assert that it would individually decide whether it would sign the 2002 Agreement. There is no basis for assuming that AMI was bound by group bargaining. The mere fact that WICA dominated the negotiations does not require a different result. The evidence does not establish that AMI was on notice of any implications the negotiations may have had on WICA members or the other employers that participated in the negotiations. Moreover, the issue is not whether the *Bonanno Linen* standards were met with regard to employers other than AMI.

The fact that AMI remitted payments for union dues and fringe benefits to the Union for the months of September, October and November and paid wages consistent with the 2002 Agreement for those months has been given little weight in determining whether AMI's participation in the 2002 negotiations was done with an the intent of bargaining on a group basis. (The issue of whether AMI adopted the agreement by making the payments is addressed separately, infra.) The payments were made after the 2002 Agreement was negotiated. The payments might lend support the contention that AMI was bound by group bargaining if there was substantial evidence that AMI made a commitment to group bargaining prior to or during

the 2002 negotiations, however, that evidence is lacking. Moreover, the revised wage and mileage rates negotiated were acceptable to AMI and Peterson had sent a fax to AMI on September 24, stating that they should be implemented. In context, the payments were was not necessarily inconsistent with bargaining on an individual basis .

3. AMI's conduct following ratification of the 2002 Agreement

The government contends on brief that AMI individually adopted the 2002 Agreement by its conduct following ratification by the Union. In an 8(f) context an employer can adopt a collective-bargaining agreement with a union by its voluntary conduct. See *E.S.P. Concrete Plumbing, Inc.*, 327 NLRB 711, 712 (1999).

In support of the argument that AMI adopted the 2002 Agreement by its conduct, the General Counsel points to the fact that AMI remitted payments for union dues and fringe benefits to the Union for the months of September, October and November, paid wages consistent with the 2002 Agreement for those months and bid jobs using the wage rates in the 2002 Agreement.

The contention that the Respondent violated the Act based upon adoption of the 2002 Agreement after the bargaining concluded raises an issue of procedural due process. The claim that AMI adopted the 2002 Agreement was not alleged in the complaint and the claim was arguably not fully litigated.

The Board judges a pleading "by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought." *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 72 (3d Cir. 1965). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100, 73 S.Ct. 552 (1953), quoting from *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 557 (6th Cir. 1940).

The allegations in the complaint are concise and specific. The complaint alleges that AMI was bound to the 2002 Agreement because Schwarz participated in the negotiations, that in October Peterson asked AMI to sign the 2002 Agreement and that since October 18, the date of Schwarz's letter to Peterson, "the Respondent has failed and refused to sign or adhere to the agreement." All the facts the General Counsel relies on to show an adoption of the contract were known to the Union and available to the government at the time the complaint issued. The claim that AMI individually adopted the contract by conduct following negotiations is legally and factually distinct from the claim that AMI indicated an unequivocal intention to be bound in collective bargaining by group rather than individual action. At no time has the General Counsel moved to amend the complaint to allege the alternative claim and the record does not show that the Respondent was informally on notice prior to the hearing that the adoption claim would be made.

The evidence relied on by the government to prove adoption was received without objection, however, that evidence also had relevance to the complaint allegations. The record does not establish that the Respondent understood at the hearing that this evidence was to be urged in support of a claim not pled. If notice of the adoption contention had been clearly given, the Respondent might well have offered additional evidence relating to the payments it made and its decision to pay union scale. Thus, It is not clear that the Respondent impliedly consented to litigate the claim not pled and Respondent arguably did not have a full and fair

opportunity to litigate the contract adoption issue. See *K-Mart Corp.*, 336 NLRB 455, 459 (2001).

On brief the Respondent acknowledges that the General Counsel could advance an argument that AMI adopted the 2002 Agreement. Assuming, without finding, that the General Counsel's contention that AMI adopted the 2002 Agreement should be considered on the merits, the evidence does not establish a violation.

The General Counsel relies on the decision in *E.S.P. Concrete Plumbing, Inc.*, 327 NLRB 711 (1999). The facts in that case bear little similarity to the instant case because that employer clearly had adopted an 8(f) agreement and repudiated it almost two years later during its term. The principal issue in *E.S.P. Concrete* was whether the adoption by contract doctrine applied in an 8(f) context. In concluding that *E.S.P*. had adopted a union contract the Board stated that a union and employer's adoption of either an 8(f) or 9(a) labor contract requires conduct manifesting an intention to abide by the terms of an agreement. Cases cited by the Board were *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355-356 (5th Cir. 1981), enfg. 236 NLRB 79 (1978); *Arco Electric v. NLRB*, 618 F.2d 698 (10th Cir. 1980) ("whether particular conduct in a given case demonstrates the existence or adoption of a contract is a question of fact"), enfg. 237 NLRB 708 (1980); and *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964) (in deciding whether an employer and a union have agreed upon a contract the Board is not bound by the technical rules of contract law).

The facts relied on by the Board in *E.S.P. Concrete, Haberman, Arco* and *Lozano* are very different than those in the present case. A major distinction is that in each of those cases there was a history of the employer operating for years under a union contract. There was evidence that the employers had held themselves out as being union contractors, had dealt with a union as if they were signatory and had accepted substantial benefits as signatory parties to union contracts.

In contrast, AMI continued to attempt to bargain for different contract terms. Peterson understood that AMI was seeking a different contract. AMI did not mislead Peterson by making dues and fringe benefit contributions for September, October and November. While an employer is not compelled to continue checkoff after a contract expires, the practice is not uncommon when an employer is seeking an agreement and wishes to maintain good relations with a union. An employer with an 8(f) relationship may make unilateral changes when a contract expires, but is not compelled to cease making payments to fringe benefit funds specified under the terms of the expired contract. Such continued payments are not inconsistent with seeking a new contract. Similarly, assuming without finding that Martinez was referred through the hiring hall, that would not be inconsistent with AMI's concurrent attempts to secure contract concessions. The implementation of the new wage scales by AMI were at the request of Peterson and were not inconsistent with AMI's demonstrated interest in seeking changes in non-wage contract provisions. The General Counsel emphasizes that AMI used the new wage rates in computing bids. There is no evidence, however, that AMI held itself out as being a union signatory contractor or that it made any representations to others regarding the wage rates.

Accordingly, assuming that the merits of the contention that AMI adopted the 2002 Agreement should be considered, the contention has not been proven.

Conclusions of Law

1. Arizona Mechanical Insulation, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Heat And Frost Insulators and Asbestos Workers, Local 73, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[2]

ORDER

The complaint is dismissed.

Dated, San Francisco, California, February 18, 2004.

Thomas M. Patton
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.